A

NANYANG UNION SDN BHD

v.

GLOVELINE INDUSTRIES (M) SDN BHD

B

COURT OF APPEAL, PUTRAJAYA
ABDUL AZIZ MOHAMAD JCA
AZMEL MAAMOR JCA
ZALEHA ZAHARI JCA
[CIVIL APPEAL NO: B-02-665-2000]

C

17 FEBRUARY 2006

SALE OF GOODS: *Conditions and warranties - Breach of condition - Agreement for sale, supply and installation of goods - Acceptance of goods - Section 42 Sale of Goods Act 1957 only a presumption - Whether*

D

presumption applies where seller knows buyer not satisfied with goods

CIVIL PROCEDURE: *Documents - Appeal records - Where documents tendered during trial not included in appeal record - Whether respondent prejudiced by appellants' neglect*

E

COMPANY LAW: *Separate legal entity - Veil of incorporation - Whether two companies with a common director can be considered as one*

CONTRACT: *Damages - Remoteness of damages - Whether claim for loss of profit too remote*

F

EVIDENCE: *Documentary evidence - Agreed documents - Whether documents become agreed documents where no objection taken or no insistence that makers be called and no cross-examination done*

EVIDENCE: *Documentary evidence - Absence of - Whether absence of*

G

documentary evidence to prove breach of contract fatal

EVIDENCE: *Hearsay - Admissibility - Whether hearsay evidence admissible as proof of truth of information*

H

On 20 April 1988 Gloveline Industries (M) Sdn. Bhd ("Gloveline") and Nanyang Union Sdn Bhd ("Nanyang") entered into an agreement for the sale, supply and installation by Nanyang to and for Gloveline of an E.G. Plant, which was a plant (production line) for the manufacture of examination gloves, consisting of one

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production line comprising certain machines and equipment ("the components"). The agreement contemplated the installation of another production line and there was a clause providing that "If after the installation of the First Production (Line) it is found that

the Machine is defective and in the opinion of the Buyer it is incapable of proper operation the Buyer shall have the right to refuse to have the Second Production Line installed at the factory and in such a situation the Buyer is entitled to request the Seller to take back the machinery and refund the purchase price to the Buyer." One of Nanyang's obligations under the agreement was to install and commission the production line to ensure that the production line, as installed, was actually capable of producing, per hour, 4,500 rubber examination gloves of the prescribed standard.

Gloveline were to pay for the plant in three instalments, of which the first instalment and part of the second instalment had been paid. Installation was commenced. Gloveline's sole witness Mohd Radwan Alami ("Radwan") painted a gloomy picture of the installation of the production line. Problems kept arising from the start. Every time the installers tried to run it, certain parts of it did not function. The installers lacked the know-how, and whenever a problem arose they made themselves scarce. Consequently the production line never achieved a production rate of 4,500 gloves per hour. The line produced only 1,000 to 2,000 gloves per hour. Apart from that, there was a high rate of rejection of gloves. Following letters of demand from Nanyang's solicitors, Gloveline's solicitors replied denying that Gloveline owed the balance sum demanded and contended that the plant had not been "commissioned properly" and saying that "your clients may take back the said Machine". But Nanyang did not do so. All operation of the plant stopped, Gloveline stopped paying rental for the factory, and the landlord put up the factory, including the plant, for auction.

Nanyang sued Gloveline for the balance of the purchase price, and Gloveline, alleging that the plant was defective and incapable of proper operation, counterclaimed for the refund of the partial payment that they had made and for losses that they claimed to have suffered. Nanyang's claim was struck out. After a full trial, Gloveline's counterclaim was allowed. Nanyang appealed against this decision.

Nanyang claimed that the evidence of Radwan was not supported by documentary proof and was hearsay evidence and therefore inadmissible. Nanyang also disputed Gloveline's entitlement to the refund of the moneys that they had paid. Nanyang's counsel contended that Gloveline were estopped from denying that the plant had been properly installed and commissioned and must be

deemed to have waived their right to reject it and claim the refund. Section 42 of the Sale of Goods Act 1957 was relied on. The reasons offered for that contention were that Gloveline rejected the plant only on 26 February 1990, the date of their solicitors' letter mentioned earlier, but at that date the warranty period had expired; that Gloveline had already installed a second production line; and that more than one year had elapsed since the plant in this case was installed and commissioned. There was evidence of an invoice from Nanyang dated 25 February 1989, for the supply of another production line. The invoice was, however, not to Gloveline but to a company called Safeline Industries (M) Sdn Bhd ("Safeline"). Nanyang also disputed other items of losses allowed by the trial judge, *inter alia*, as follows: (i) loss of opportunity to make a profit – on the grounds that the loss was too remote; (ii) cost of raw materials for testing the line – on the grounds that the documents to prove the purchase of the raw materials were non-agreed documents the makers of which were not called to testify. Nanyang's counsel further submitted that Gloveline had "received a certain sum of money" from the gloves that were produced from the raw materials; and (iii) general damages for loss of opportunity to fulfil orders that had been made – on the grounds that there was no evidence to prove the existence of orders that Gloveline claimed they were not able to fulfil as a result of Nanyang's breach of the agreement.

Held (dismissing the appeal with costs)
Per Abdul Aziz Mohamad JCA:

(1) Insofar as Radwan's evidence was as to what he was informed by two other persons, the evidence was hearsay and was inadmissible as proof of the truth of the information. But on the whole there was sufficient admissible evidence on which the trial judge could have correctly concluded that the plant failed to achieve a production rate of 4,500 gloves per hour and that the rate of rejection of gloves was unacceptably high, and that therefore the plant could not have been truly commissioned and was not commissioned. There were occasions when Radwan himself was present to witness the fact that the plant failed to produce 4,500 gloves per hour and the fact that the percentage of rejection was high. This fact is a fact that does not require expertise in order to perceive. On the other hand, Nanyang did not produce evidence that the plant did, after installation, produce gloves

at the rate of 4,500 per hour and that the rate of rejection of gloves was within acceptable limits. There was therefore no evidence on Nanyang's part of commissioning. After balancing the evidence of Radwan against that of Nanyang's witnesses the judge was entitled to conclude that the plant was not performing as it was expected to and that there was no commissioning. (paras 17, 18 & 19)

(2) While documentary evidence on Gloveline's part would have strengthened their case, its absence was not fatal to it. Nanyang's argument as to proof of breach of contract therefore failed. (para 19)

(3) Since the plant was not commissioned, the warranty period of six months from the date of commissioning never commenced and the question of the lapsing of any period since commissioning could not arise. Gloveline were entitled to refuse the second production line and also to claim a refund of the payment for the first production line. (paras 20 & 23)

(4) Safeline was a different entity from Gloveline even though Radwan was a director of both companies. The plant ordered by Safeline was not the second production line contemplated the agreement because the agreement contemplated the purchase of a second production line by Gloveline, not Safeline. (para 21)

(5) Section 42 of the Sale of Goods Act 1957 is only a presumption. The presumption does not apply in this case because right from the beginning Nanyang knew that Gloveline were not satisfied with the production line because it failed to achieve the rate or level of performance that was agreed and because the line was in fact not commissioned. This was not merely a sale of the components of the production line. It was the sale of those things as installed and commissioned to become a plant. Until the plant was commissioned, what with its being defective to the knowledge of Nanyang, it is inconceivable that Gloveline would have accepted it and that Nanyang would have been led into thinking that Gloveline had accepted it. (para 24)

(6) The award for loss of profit that Gloveline would have made had they been able to manufacture one million gloves and sell them was not too remote. (para 27)

(7) As for the cost of raw materials for testing the line when testifying on this item Radwan referred to those documents in support of Gloveline's claim, but there was no objection from Nanyang or insistence by them that the makers be called. Therefore the documents were admitted collectively as exhibit D24. Radwan was not cross-examined on the documents. Impliedly the documents had become agreed documents. (para 30)

(8) In relation to the monies allegedly received by Gloveline from the gloves that were produced from the raw materials, there was no evidence of the actual amount that Gloveline received. In the circumstances, it was not unjust on the judge's part not to have allowed any deduction. (para 31)

(9) In relation to general damages, there were other orders that Gloveline were not able to fulfil at all. The general damages was properly allowed to cover those other orders. There were documents tendered during the trial to prove the existence of the orders or contracts, but Nanyang had not included them in the appeal record and therefore Gloveline should not be prejudiced by Nanyang's neglect. (paras 35 & 36)

Bahasa Malaysia *translation of headnotes*

Pada 20 April 1988, Gloveline Industries (M) Sdn Bhd ('Gloveline') dan Nanyang Union Sdn Bhd ('Nanyang') memeterai satu perjanjian bagi penjualan, pembekalan dan pemasangan Kilang E.G oleh Nanyang untuk Gloveline. Kilang tersebut adalah sebuah kilang yang mengeluarkan sarung tangan pemeriksaan, dan mengandungi satu jalur produksi terdiri dari beberapa mesen dan peralatan tertentu ('komponen-komponen'). Perjanjian membayangkan pemasangan satu lagi jalur produksi dan terdapat satu fasal yang menyatakan "sekiranya, selepas pemasangan Jalur Produksi Pertama ianya didapati bahawa mesen berkenaan cacat dan tidak boleh beroperasi dengan sewajarnya menurut pendapat Pembeli, maka Pembeli berhak untuk menolak pemasangan Jalur Produksi Kedua di kilang, dan dalam halkeadaan sedemikian Pembeli berhak untuk meminta Penjual mengambil balik mesen-mesen dan mengembalikan harga belian kepada Pembeli". Salah satu obligasi Nanyang di bawah perjanjian adalah untuk memasang dan memulakan jalur produksi bagi mempastikan bahawa jalur produksi, setelah dipasang, mampu mengeluarkan, dalam seminit, 4500 sarung tangan pemeriksaan getah mengikut standard yang ditetapkan.

Gloveline dikehendaki membayar harga kilang melalui tiga bayaran, di mana bayaran pertama dan sebahagian bayaran kedua sudahpun dibayar. Saksi tunggal Gloveline, Mohd Radwan Alami ('Radwan') memberi gambaran buruk mengenai pemasangan jalur produksi. Masaalah sentiasa timbul sejak ia mula dipasang. Bahagian-bahagian tertentu jalur didapati tidak berfungsi setiap kali pemasang-pemasang cuba menghidupkannya. Pemasang-pemasang tidak mempunyai pengetahuan teknikal, dan mereka menghilangkan diri setiap kali masaalah timbul. Akibatnya, jalur produksi gagal mencapai tahap pengeluaran 4,500 sarung tangan seminit. Jalur hanya mengeluarkan antara 1,000 hingga 2,000 sarung tangan seminit. Selain itu, kadar sarung tangan yang ditolak adalah tinggi. Ekoran surat-surat tuntutan yang dihantar oleh peguamcara Nanyang, peguamcara Gloveline menjawab bahawa Gloveline tidak terhutang jumlah yang dituntut dan menegaskan bahawa kilang telah tidak 'ditauliahkan dengan sewajarnya' dan bahawa 'klien anda boleh mengambil balik Mesen tersebut'. Apapun, Nanyang tidak berbuat demikian. Kesemua operasi kemudian berhenti. Akibatnya, Gloveline menghentikan bayaran sewa kilang dan tuantanah mengambil langkah untuk melelong kilang, termasuk bahagian produksinya.

Nanyang mendakwa Gloveline untuk baki harga belian, dan Gloveline, dengan mengatakan bahawa kilang cacat dan gagal beroperasi sewajarnya, menuntut balas supaya dikembalikan bayaran yang sudah dibuat dan dipampasi kerugian yang dialaminya. Tuntutan Nanyang telah dibatalkan, manakala tuntutan balas Gloveline telah dibenarkan selepas satu perbicaraan penuh. Nanyang merayu terhadap keputusan ini.

Nanyang mendakwa bahawa keterangan Radwan tidak disokong oleh bukti dokumentari dan adalah keterangan dengar cakap yang tidak harus diterima-masuk. Nanyang juga mencabar hak Gloveline untuk mendapat kembali jumlah yang dibayar. Peguamcara Nanyang berhujah bahawa Gloveline diestop dari menyangkal bahawa kilang telah dipasang atau ditauliahkan dengan sewajarnya, dan harus dianggap sebagai telah melupuskan haknya untuk menolak kilang tersebut dan menuntut jumlah yang dibayar. Beliau bergantung kepada s. 42 Akta Jualan Barangan 1972. Alasan bagi pengataan-pengataan ini adalah bahawa Gloveline hanya menolak kilang pada 26 Februari 1990, iaitu pada tarikh surat peguamcara mereka di atas, sedangkan pada tarikh tersebut tempoh waranti sudah luput; bahawa Gloveline sudahpun memasang jalur produksi kedua; dan bahawa setahun sudah berlalu sejak kilang dipasang

dan ditauliahkan. Terdapat keterangan inbois dari Nanyang bertarikh 25 Februari 1989, bagi pembekalan satu lagi jalur produksi. Inbois, bagaimanapun, bukan ditujukan kepada Gloveline, tetapi kepada sebuah syarikat bernama Safeline Industries (M) Sdn Bhd ('Safeline'). Nanyang seterusnya menyangkal item-item kerugian lain yang dibenarkan hakim bicara, termasuk: (i) kehilangan peluang untuk membuat keuntungan – atas alasan bahawa kerugian adalah terpencil; (ii) kos bahan mentah untuk menguji jalur – atas alasan bahawa dokumen-dokumen untuk membuktikan pembelian bahan mentah adalah dokumen tidak dipersetujui, di mana pembuat dokumen tidak dipanggil sebagai saksi. Peguamcara Nanyang juga menghujah bahawa Gloveline telah "menerima sejumlah wang" dari sarung-sarung tangan yang berjaya dikeluarkan dari bahan-bahan mentah tersebut; dan (iii) gantirugi am bagi kehilangan peluang untuk memenuhi pesanan-pesanan yang dibuat – atas alasan bahawa tidak terdapat keterangan yang menunjukkan bahawa pesanan-pesanan tersebut wujud dan bahawa Golveline gagal memenuhinya disebabkan kemungkiran perjanjian di pihak Nanyang.

Diputuskan (menolak rayuan dengan kos)
Oleh Abdul Aziz Mohamad HMR:

(1) Mengambil kira bahawa keterangan Radwan adalah mengenai apa yang diberitahu kepadanya oleh dua orang yang lain, keterangannya itu adalah pandang dengar dan tidak boleh diterima-masuk sebagai bukti akan kebenaran maklumat berkenaan. Bagaimanapun, pada keseluruhannya, terdapat keterangan boleh diterima-masuk yang mencukupi bagi membolehkan hakim bicara mendapati, dengan betulnya, bahawa kilang gagal mencapai kadar pengeluaran 4,500 sarung tangan sejam dan bahawa kadar sarung tangan yang ditolak adalah terlalu tinggi, yang bererti kilang telah tidak ditauliahkan atau tidak ditauliahkan dengan sempurnanya. Terdapat masa-masanya di mana Radwan hadir sendiri dan menyaksikan kilang gagal mengeluarkan 4,500 sarung tangan sejam dan kadar penolakan yang tinggi tersebut. Fakta ini adalah fakta yang tidak memerlukan seorang pakar untuk memahaminya. Sebaliknya, Nanyang tidak mengemukakan sebarang bukti bahawa kilang, setelah dipasang, telah berjaya mengeluarkan 4,500 sarung tangan sejam atau bahawa kadar penolakan adalah dalam jumlah yang munasabah dan boleh diterima. Nanyang, dengan itu, gagal membuktikan bahawa kilang telah ditauliahkan. Dengan mempertimbang kedua-dua keterangan

Radwan dan Nanyang, hakim berhak untuk merumuskan bahawa kilang gagal berfungsi seperti yang dijangka serta tidak ditauliah. A

(2) Sementara keterangan dokumentari akan memperkuatkan kes Gloveline, ketiadaannya tidaklah sampai memudaratkan kes mereka. Oleh itu, hujah Nanyang berkaitan pembuktian kemungkiran kontrak harus gagal. B

(3) Oleh kerana kilang tidak ditauliah, tempoh enam bulan waranti dari tarikh tauliah tidak pernah berjalan dan persoalan keluputan tempoh tersebut selepas tauliah tidak berbangkit. Gloveline berhak untuk menolak jalur produksi kedua dan seterusnya menuntut bayaran balik jumlah yang sudahpun dibayarnya. C

(4) Safeline adalah entiti yang berbeza dari Gloveline, walaupun Radwan merupakan pengarah bagi kedua-dua syarikat. Kilang yang dipesan oleh Safeline bukanlah jalur produksi kedua seperti yang dibayangkan oleh perjanjian, kerana perjanjian membayangkan pembelian jalur produksi kedua oleh Gloveline, bukannya oleh Safeline. D E

(5) Seksyen 42 Akta Jualan Barangan 1967 hanyalah suatu anggapan. Anggapan tersebut tidak terpakai kepada kes di sini kerana Nanyang, sejak awal-awal lagi, menyedari bahawa Gloveline tidak berpuashati dengan jalur produksi disebabkan kegagalannya mencapai kadar pengeluaran yang dipersetujui dan kerana ianya tidak ditauliah. Ini bukan semata-mata suatu jualan komponen-komponen jalur produksi. Ia adalah jualan apa yang telah dipasang dan ditauliah sebagai sebuah kilang. Sehingga kilang ditauliahkan, adalah mustahil untuk Gloveline menerimanya, atau untuk Nanyang merasakan bahawa ia akan diterima, sementelah kecacatan kilang memang diketahui oleh Nanyang. F G

(6) Award bagi kehilangan keuntungan yang Gloveline mungkin akan perolehi sekiranya mereka berjaya mengeluarkan dan menjual sejuta sarung tangan, bukanlah sesuatu yang terlalu terpencil. H

I

A **(7)** Berhubung kos bahan mentah untuk ujian jalur produksi, Radwan, apabila memberi keterangan mengenai item ini, telah merujuk kepada dokumen-dokumen berkaitan untuk menyokong tuntutan Gloveline. Nanyang tidak membantahnya dan tidak juga meminta supaya pembuat dokumen dipanggil sebagai saksi.
B Dokumen tersebut, dengan itu, telah diterima-masuk sebagai eksibit D24. Radwan tidak diperiksa balas tentang dokumen. Maka secara tersiratnya dokumen sudah menjadi dokumen yang dipersetujui.

C **(8)** Berhubung jumlah wang yang dikatakan telah diterima oleh Gloveline dari sarung-sarung tangan yang telah dijual, yang dibuat dari bahan-bahan mentah, tidak ada keterangan mengenai jumlah sebenar yang diterima oleh Gloveline. Dengan itu, bukanlah sesuatu yang tidak adil apabila hakim enggan
D membuat sebarang potongan di situ.

(9) Berhubung kerugian am, terdapat pesanan-pesanan lain yang langsung gagal dipenuhi oleh Gloveline. Kerugian am telah dibenarkan dengan sewajarnya bagi menampungi pesanan-
E pesanan lain tersebut. Di perbicaraan, dokumen-dokumen telah dikemukakan bagi membuktikan kewujudan pesanan-pesanan atau kontrak tersebut, tetapi Nanyang gagal memasukkan dokumen-dokumen tersebut ke dalam rekod rayuan. Kecuaian Nanyang tersebut tidak harus memprejudis Gloveline.

F **Legislation referred to:**
Sale of Goods Act 1957, s. 42

For the appellant - Foong Chee Hoe (Mohamad Zaidi Othman with him); M/s LC Chong & Co
For the respondents - Dominic Puthucheary (Feroz Hussain & Shanti
G *Abraham with him); M/s Muhammad & Co*

[Appeal from High Court, Shah Alam; Civil Suit No: 22-72-1990]

Reported by Amutha Suppayah

H

JUDGMENT

Abdul Aziz Mohamad JCA:

I **[1]** On 20 April 1988 Gloveline Industries (M) Sdn. Bhd ("Gloveline") and Nanyang Union Sdn Bhd ("Nanyang") entered into an agreement for the sale, supply and installation by Nanyang

to and for Gloveline of an E.G. Plant, which was a plant for the manufacture of examination gloves, consisting of one production line comprising, as cl. 2.1 termed them, the "machines and equipment" which were described in a schedule to the agreement. In the High Court, Nanyang sued Gloveline for the balance of the purchase price, and Gloveline, alleging that the plant was defective and incapable of proper operation, counterclaimed for the refund of the partial payment that they had made and for losses that they claimed to have suffered. Nanyang's claim was struck out. After a full trial, Gloveline's counterclaim was allowed, and this gave rise to the present appeal by Nanyang. The learned trial judge, who gave his decision on 12 September 2000, has gone on retirement without preparing his grounds of judgment. So we heard the appeal without the benefit of the trial judge's findings of fact and reasoning.

[2] Since, to our understanding, the plant was the production line, and the production line was the plant, we shall use either the term "plant" or "production line" (or just "line"), according as to which is felt more apt for the context, to refer to the same thing. We shall refer to the "machines and equipment" as "the components".

[3] The production line was to be capable of producing, per hour, 4,500 pieces of rubber examination gloves of the prescribed standard.

[4] Although the agreement was only in respect of one production line, for which the contracted price was USD 305,000, cl. 5 contemplated the installation of another production line. Clause 5.3 provided as follows:

> 5.3. If after the installation of the First Production [Line] it is found that the Machine is defective and in the opinion of the Buyer it is incapable of proper operation the Buyer shall have the right to refuse to have the Second Production Line installed at the factory and in such a situation the Buyer is entitled to request the Seller to take back the machinery and refund the purchase price to the Buyer.

[5] The first part of cl. 7.2 provided as follows:

> 7.2. The Seller shall design, construct, supply and install the Machinery and equipment and shall guarantee that the commissioning of each of the two (2) Production Lines are capable of meeting the Production quantity and Quality Targets of E.G. Plant …

It has not been in dispute that one of Nanyang's obligations under the agreement was to install and commission the production line and that, by the guarantee as to commissioning that they gave under that clause, Nanyang undertook, by the commissioning, to ensure that the production line, as installed, was actually capable of producing, per hour, 4,500 rubber examination gloves of the prescribed standard. For this appeal, we accept the definition of "commissioning" given in a publication called *Mechanical Completion Handbook* by A. Dynowski (October 2000 Edition) at p. 6, where it is said that the term:

> Means the testing and adjustment of an assembly or plant sections and will comprise of Operational testing under real or simulated conditions to ensure that it meets all applicable Rules, Regulations, Codes and Standards and that it fulfils it's *(sic)* intended duty and ready for start-up.

Installation and commissioning were therefore two different things. Mere installation would serve no purpose if the production line could not function to produce the result that it was agreed it should produce. There must also be commissioning.

[6] Gloveline were to pay for the plant in three instalments: the first, of USD 150,000, when the components of the production line were ready for shipment; the second, of USD 120,000, upon completion of "installation and commissioning of the Machine and equipment" – which effectively meant upon commissioning of the production line – "at the buyer's factory" (cl. 4.1(b)); and USD 35,000 upon expiry of the guarantee period, which, according to cl. 6, was six months from the date of commissioning.

[7] Before dealing with the arguments advanced by Nanyang in this appeal, and in order that the arguments may be conveniently dealt with, it is well to set out certain relevant matters that are revealed by the oral and documentary evidence. As far as oral evidence is concerned, it comprises the testimonies of Gloveline's sole witness, Encik Mohd Radwan Alami ("Radwan"), a director of Gloveline, and of Nanyang's two witnesses, Encik Chin Ping Sang ("Chin"), a director of Nanyang, and Encik Kuan Teck ("Kuan"), the person whom Nanyang appointed to install the production line. As regards Radwan, it should be mentioned that in this appeal Nanyang's counsel has abandoned his intention to question this witness's credibility. This means that in this appeal Radwan's credibility is not in issue.

[8] The components were shipped from Taiwan on or about 2 August 1988. The first instalment of USD 150,000 had been paid. There is no evidence of the precise date when installation at Gloveline's premises commenced. But of the second instalment of USD 120,000, which was due upon commissioning, Gloveline made a part-payment of USD 80,000 (RM200,000) on 10 November 1988, and it is clear from Radwan's evidence that on that date installation had commenced. So installation would have commenced sometime before that date.

[9] Radwan's evidence as a whole painted a gloomy picture of the installation of the production line. Problems kept arising from the start, so that in 1989 the line was still being tested. Every time the installers, Kuan and his men, tried to run it, certain parts of it did not function. The installers lacked the know-how, and whenever a problem arose they made themselves scarce. They ran away. They disappeared. The consequence of all that was that the production line never achieved a production rate of 4,500 gloves per hour. Radwan said in cross-examination that he was actually present when the line produced only 1,000 to 2,000 gloves per hour. Apart from that, there was a high rate of rejection of gloves. At first, out of a batch produced, there was a 30 percent rejection of gloves that did not satisfy the prescribed standard, but even after another "unit" was installed, the rejection rate dropped to only between 15 to 30 percent, whereas the acceptable rate was a mere 1.5 to 4 percent. Radwan in cross-examination said that he was sometimes actually present at the counting of rejected gloves. Gloveline had to call in a researcher from the Rubber Research Institute, a Dr. Shukri, who ultimately formed the opinion that the plant could not do better than produce rejects at 15 to 18 percent. Gloveline had to employ a foreigner as a Technical Director, Amer Hariri ("Amer"), to solve the problems with the production line by looking into its design and operation, but his finding was that there was no way that the line could perform as it was expected to. Radwan said that complaints were made on many occasions, to Chin, but mostly to the men who were doing the installation, but to no avail. Radwan, in cross-examination, said that he learned about the malfunctioning of the system and of the rejection of gloves mostly from information given by Amer, but on many occasions he was actually present to witness those occurrences.

[10] To come back to the matter of payment, Radwan said that he paid the USD 80,000 of the second instalment of USD 120,000 before Dr. Shukri of the RRI confirmed that the production line could not perform any better, and that he did so in order to help Nanyang with their cash flow, but after that payment Nanyang became careless. According to Chin, with the payment of USD 80,000 (RM200,000) or shortly after that, Radwan also gave a cheque for RM100,000 to settle the balance of USD40,000. This cheque was postdated 25 January 1989. From Radwan's answers in cross-examination at p. 18 of the judge's notes it would appear that, according to Radwan, it was agreed that by that date the line would be commissioned and Nanyang promised to cash the cheque only after the line was commissioned and subsequently – the notes do not mention the date – because the line was still not commissioned Nanyang themselves asked that the cheque be replaced by another cheque. That was in fact done. Another cheque was issued, this time postdated 3 November 1989. Taking Radwan's testimony to be true – which we must do because his credibility is not in issue – this must mean that by 25 January 1989, the line had still not been commissioned and that the new expected date of commissioning would be before 3 November 1989. It also stands to reason that Radwan could not have got back the cheque postdated 25 January 1989, unless Nanyang voluntarily surrendered it, and Nanyang would not have surrendered it but would have banked it if the plant had been commissioned by 25 January 1989.

[11] It is therefore strange that on 12 January 1989, Chin wrote to Gloveline a thank-you letter in which he said that Nanyang "are happy that the installation undertaken at your factory is now completed". The letter mentioned only "installation". In view of what we said earlier, and as the letter did not mention about commissioning, that letter, contrary to the contention of Nanyang's counsel, cannot be accepted as evidence that the plant was commissioned on 12 January 1989. As to Gloveline's reaction to this letter, Radwan said he could not recall whether he responded to the letter.

[12] In the letter Chin praised Amer for his "co-operation" and his "controlling and brushing systems" which Chin said "has given us and *(sic)* invaluable knowledge of engineering design, which could be improved in our plant in future". That may be viewed as an indirect and unconscious admission that Nanyang were

deficient in knowledge of engineering design and that the plant that was installed needed improving, which lends support to, or at least is consistent with, Radwan's evidence that the men installing the plant lacked technical know-how and that the plant was defective.

[13] According to Radwan, he instructed the bank to stop payment on the cheque postdated 3 November 1989, because Nanyang refused to complete the commissioning or rectify defects or replace defective parts.

[14] There is evidence of a letter from Nanyang to Gloveline dated 19 January 1990, well after the new expected date of commissioning, 3 November 1989, which Radwan said in cross-examination he had not seen before. On the date of the letter, Chin, as he admitted in cross-examination, was still in possession of the cheque postdated 3 November 1989. He had not banked it in. The letter demanded payment of the entire balance, claiming that the plant had been successfully commissioned "for more than a year", which seems to be a reference to the date 12 January 1989, of the earlier letter, which we said cannot be accepted as evidence of commissioning on that date. The sum demanded was RM263,750, which, by our reckoning, covered the USD 40,000 that the cheque postdated 3 November 1989, was intended to pay, USD 35,000 that was due six months after commissioning, and USD 20,000 for a hot-air heating system, the inclusion of which can be seen in para. 6 of the amended statement of claim and which Chin admitted in cross-examination was outside the scope of the agreement. To explain why he made the demand before banking in the cheque postdated 3 November 1989, for settling the USD 40,000, and which was in his possession and which he could have banked in, he said in re-examination that he knew that the cheque would bounce. Yet in examination-in-chief he had said, as is also proved by banking evidence, that he did after all bank in the cheque on 24 January 1990, not knowing that payment had been ordered to be stopped. Chin's explanation for not banking in the cheque on 3 November 1989, or before he demanded payment on 19 January 1990, is not satisfactory.

[15] Next followed letters of demand from Nanyang's solicitors dated 5 and 13 February 1990, to which, on 26 February 1990, Gloveline's solicitors replied denying that Gloveline owed the sum demanded, contending that the plant had not been "commissioned properly", and saying that "your clients may take back the said

Machine". But Nanyang did not do so. Radwan said that all operation of the plant stopped, Gloveline stopped paying rental for the factory, and the landlord put up the factory, including the plant, for auction, but there were no bidders.

[16] In this appeal, Nanyang, by their counsel, presented argument on two matters. The first matter concerns proof of breach of agreement on the part of Nanyang. It was argued that the evidence of Radwan, Gloveline's only witness, as to breach was not supported by documentary proof, such as records of the percentage of rejection of gloves, and was, moreover, hearsay evidence and therefore inadmissible, because it consisted of what he had been informed by Dr Shukri of the RRI and by Amer, Gloveline's Technical Director, neither of whom had been called to testify.

[17] We agree that insofar as Radwan's evidence was as to what he was informed by those two persons, the evidence was hearsay and was inadmissible as proof of the truth of the information. But on the whole we are satisfied that there was sufficient admissible evidence on which the trial judge could have correctly concluded, as he must have done, that the plant failed to achieve a production rate of 4,500 gloves per hour and that the rate of rejection of gloves was unacceptably high, and that therefore the plant could not have been truly commissioned and was not commissioned. As has been related, there were occasions when Radwan himself was present to witness the fact that the plant failed to produce 4,500 gloves per hour and the fact that the percentage of rejection was high. The former fact is a fact that does not require expertise in order to perceive. As to the latter fact, we are unable to accept that Radwan would not have been able to judge whether a glove satisfied the prescribed standard. It would appear from the notes that he was not cross-examined as to what he observed the defects in the rejected gloves to be. Then, as has been related, there is the evidence of the exchange of the postdated cheques, which shows that the expected commissioning on or before 25 January 1989, did not take place and that another date, a date before 3 November 1989, was targeted for it.

[18] On the other hand Nanyang did not produce evidence that the plant did, after installation, produce gloves at the rate of 4,500 per hour and that the rate of rejection of gloves was within acceptable limits. There was therefore no evidence on Nanyang's

part of commissioning. Chin, the director, merely kept insisting that the plant was commissioned, but he could not say on what date it was commissioned. The fact was that there was no commissioning. Kuan, the person in charge of installation, merely said in examination-in-chief that he tested the plant to ensure that the rate of production was about 4,000 to 5,000 gloves per hour, but he did not go on to state that the plant actually did produce gloves at that rate, and he was not sure when the plant began to run or operate. In cross-examination, in answer to a question about damaged gloves, he gave an answer that we are not able to make sense of: "At first damages – Yes. 1% or 2% spott (sic: probably "spoilt"). After correction, 1-2% damages". Later on, while affirming that he did test-run the plant, he admitted that he did not make a report of the test run; and as to quality, he said that he did not know the quality of the product, that his concern was only to see to it that the plant could produce hand-gloves, and that he did not conduct tests on the product.

[19] After balancing the evidence of Radwan against that of Chin and Kuan the judge would clearly have been right if he concluded, as he must have done, that the plant was not performing as it was expected to and that there was no commissioning. While documentary evidence on Gloveline's part would have strengthened their case, its absence was not fatal to it. Nanyang's argument as to proof of breach of contract therefore fails.

[20] The second matter that Nanyang presented argument on was the question of Gloveline's entitlement to the refund of the moneys that they had paid. It will be recalled that Gloveline had paid USD 150,000 and RM200,000 (for USD 80,000, at the exchange rate of 2.5). The High Court ordered Nanyang to pay back to Gloveline the two sums, the sum of USD 150,000 being converted to RM375,000, applying the exchange rate of 2.5. The total sum ordered was therefore RM575,000. Nanyang's counsel contended that Gloveline were estopped from denying that the plant had been properly installed and commissioned and must be deemed to have waived their right to reject it and claim the refund. The reasons offered for that contention were that Gloveline rejected the plant only on 26 February 1990, the date of their solicitors' letter mentioned earlier, but at that date the warranty period had expired; that Gloveline had already installed a second production line; and that more than one year had elapsed since the plant in this case was installed and commissioned. That contention cannot stand because the reasons

offered for it are not valid. Since the plant was not commissioned, the warranty period of six months from the date of commissioning never commenced and the question of the lapsing of any period since commissioning could not arise.

[21] A few words need to be said about the reason that a second production line had been installed. There is evidence of an invoice from Nanyang dated 25 February 1989, for the supply of another production line. That date was one month after the date of Gloveline's first postdated cheque for RM100,000, namely 25 January 1989, which, as we said, Radwan's evidence indicated was the expected date of the commissioning of the line that was the subject of the agreement in this case. The invoice was, however, not to Gloveline but to a company called Safeline Industries (M) Sdn Bhd ("Safeline"). From Radwan's answer in cross-examination at p. 22 of the notes, which included an admission that he was also a director of Safeline, Nanyang's counsel submitted that Radwan admitted that Safeline had purchased a second production line and installed it at Gloveline's factory. It was argued that the supposed admission constituted proof that the line that was the subject of the agreement in this case was capable of normal operation. This argument must be rejected for several reasons. Safeline was a different entity from Gloveline even though Radwan was a director of both companies. The plant ordered by Safeline was not the second production line contemplated by cl. 5 of the agreement because cl. 5 contemplated the purchase of a second production line by Gloveline, not Safeline. Radwan maintained at p. 22 of the notes that Safeline's production line was not functioning and was not even completed. Finally, whatever may be said about the line that Safeline ordered, the fact remains that on the evidence the line that was the subject of the agreement in this case was defective and was not commissioned.

[22] It was further submitted that Gloveline were not entitled to the refund because they failed to give notice of termination of the agreement under cl. 8.1(c). Clause 8.1 provided as follows:

> 8.1 Either party shall be entitled at any time by giving notice in writing to the other party to terminate this Agreement forthwith at the happening of any of the following events:
>
> (a) If the other party shall go into liquidation other than voluntary liquidation for the purpose of reorganization;

(b) If the other party shall cease to carry on its business; or

(c) If the other party shall commit any material breach of any of the provisions of this Agreement and shall fail within sixty (60) days after being notified thereof in writing to remedy such breach.

[23] Gloveline's claim to the refund was made by virtue of cl. 5.3, which we shall quote again:

> 5.3 If after the installation of the First Production (Line) it is found that the Machine is defective and in the opinion of the Buyer it is incapable of proper operation the Buyer shall have the right to refuse to have the Second Production Line installed at the factory and in such a situation the Buyer is entitled to request the Seller to take back the machinery and refund the purchase price to the Buyer.

Our understanding of the clause is that in the event stated in the clause, despite the words "and in such a situation", Gloveline were entitled to refuse the second production line and also to claim a refund of the payment for the first production line, that is the production line that was the subject of the agreement. We are also of opinion that the operation of the clause, which was special in nature, was not dependent on the termination of the agreement under cl. 8.1, which was general in nature. We should mention that Gloveline's counsel submitted that because of the words "in the opinion of the Buyer", whether the plant was defective and incapable of proper operation depended entirely on Gloveline's opinion, that is to say, that Gloveline had the last say, so that, relying on the clause, Gloveline did not have to prove that the plant was in fact so. We do not have to decide on that contention because there is evidence that the plant was in fact defective and was not commissioned.

[24] Section 42 of the Sale of Goods Act 1957 was relied on for arguing that since the rejection of the plant was unduly delayed, Gloveline must be deemed to have accepted the plant and were therefore not entitled to reject it. The relevant part of the section says: "The buyer is deemed to have accepted the goods … when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them". It is only a presumption. In our opinion the presumption does not apply in this case because right from the beginning Nanyang knew that Gloveline were not satisfied with the production line because it

failed to achieve the rate or level of performance that was agreed and because the line was in fact not commissioned. This was not merely a sale of the components of the production line. It was the sale of those things as installed and commissioned to become a plant. What was agreed to be sold and purchased according to cl. 2.1 was essentially "the E.G. Plant". Until the plant was commissioned, what with its being defective to the knowledge of Nanyang, it is inconceivable that Gloveline would have accepted it and that Nanyang would have been led into thinking that Gloveline had accepted it.

[25] In our judgment, therefore, Nanyang fail in their argument as to Gloveline's entitlement to the refund.

[26] Nanyang also disputed other items of losses allowed by the trial judge.

Loss Of Opportunity To Make A Profit

[27] Because the plant could not produce gloves to meet orders made to them, Gloveline had to buy gloves from Nanyang and other sources to satisfy the orders. It can be seen from p. 49 of his notes that the judge made his award of this item on the basis of one million gloves that Gloveline bought from Nanyang for USD 27,000 (USD 27.00 for 1,000 gloves). The notes seem to indicate that the judge found that were Gloveline to produce the gloves themselves the cost to them would have been USD 24,500 (USD 24.50 for 1,000 gloves). The difference of USD 2,500 was the profit that Gloveline would have made had they been able to manufacture one million gloves and sell them for USD 27,000. At the exchange rate of 2.5, the difference came to RM6,250, which was what the judge awarded. Nanyang's counsel submitted that there was no proof for this item of loss and that the loss was too remote. We do not think that the loss was too remote. As to proof, the fact of purchase by Gloveline of one million gloves from Nanyang for USD 27,000 is Gloveline's letter dated 17 October 1989, at p. 192 of the appeal record. For the production cost of USD 24,500, the judge referred to "C – pg 39". It has not been shown to us where in the appeal record this page is. But Nanyang's counsel has not attempted to show that that page does not support the judge's finding. We assume therefore that the finding is correct.

Rental Of Premises

[28] We understand this to be the rental of the factory premises for the plant. The judge awarded RM24,000 (RM16,000 per month) for the period of one month and a half from 15 May 1990, to the end of June 1990. That period was after Gloveline asked Nanyang to take back the components of the production line. 15 May 1990, was the date when Gloveline were evicted by the landlord. But the plant remained on the premises and Gloveline still had to pay rental. Nanyang's only submission against this item was virtually to say that since Gloveline had accepted the plant they should bear the rental. The submission fails because Gloveline had not accepted the plant.

Cost Of Replacing Latex Dipping Tank

[29] The judge awarded RM7,500, being the cost of the new tank. Nanyang's counsel submitted that Nanyang should not be liable for the cost because no notice was given to them that the tank supplied by them was defective and because Chin maintained that the tank was damaged by Gloveline. We do not think that a notice was necessary to entitle Gloveline to claim the cost of the new tank. Chin's contention that Gloveline damaged the tank seems to be a bare allegation. Radwan's evidence was that when the tank, which was made of stainless steel, was put to the test, which must have been by Nanyang's men, it bulged out of shape. It was part of the evidence of the defect in the production line. Chin did not say in what manner Gloveline damaged the tank. Radwan was not questioned in cross-examination to show that it was Gloveline that had damaged the tank.

Cost Of Raw Materials For Testing The Line

[30] The trial judge awarded RM37,387.45 for this. Nanyang's counsel submitted that no award should have been made because the documents to prove the purchase of the raw materials were non-agreed documents the makers of which were not called to testify. Gloveline's counsel submitted that when testifying on this item Radwan referred to those documents in support of Gloveline's claim, but there was no objection from Nanyang or insistence by them that the makers be called. Therefore the documents were admitted collectively as exhibit D24. Further, it was submitted that Radwan was not cross-examined on the

documents. Gloveline's submission amounted to saying that impliedly the documents had become agreed documents. We accept Gloveline's submission.

[31] Nanyang's counsel further submitted that Gloveline had "received a certain sum of money" from the gloves that were produced from the raw materials. We think the point was that the amount received should have been deducted from the sum awarded. There is no evidence of the actual amount that Gloveline received. Radwan in cross-examination did not give the amount. Page 21 of the notes was referred to by Nanyang's counsel, where Radwan said that maybe the production line produced a few thousand pieces. But it does not appear that he was asked in cross-examination to state the amount that Gloveline received from the gloves produced. On the other hand, at page 25 of the notes Radwan in re-examination said that Gloveline only got "a few dollars" out of the raw materials. In the circumstances, it was not unjust on the judge's part not to have allowed any deduction.

General Damages

[32] From the submissions of both counsel, we gather the position to be as follows.

[33] Originally, Gloveline claimed RM380,000 in their amended statement of defence and counterclaim for their loss of opportunity to fulfil their commitments to deliver gloves to their "waiting customers", and there was no claim for general damages. During the trial, after Radwan had been cross-examined, Gloveline's counsel applied to amend the counterclaim to include a prayer for general damages. Nanyang's counsel said that he did not object, and the amendment was allowed. At the end of the trial, the learned trial judge awarded RM250,000 as general damages, stating that the sum was fair and reasonable. He had earlier reduced to RM6,250 the award under the head under which Gloveline had claimed RM380,000. We have dealt with the award of RM6,250.

[34] A point raised by Nanyang's counsel was that it did not make sense that after reducing the claim of RM380,000 to RM6,250 the trial judge should award RM250,000 as general damages. Obviously counsel meant to say that the judge, by making the reduction, had decided that Gloveline were not entitled to more than RM6,250 for loss of opportunity to fulfil orders that had been made.

[35] As has been seen, the award of RM6,250 was related to the purchase of gloves by Gloveline from Nanyang in order to fulfil an order or orders and was based specifically on the price at which Nanyang sold the gloves to Gloveline. But there were other orders that Gloveline were not able to fulfil at all. Gloveline's counsel submitted that the general damages to include which the amendment was allowed was to cover those other orders, that is, the remainder of the RM380,000 claimed. We agree with Gloveline's counsel and we reject the submission of Nanyang's counsel that awarding general damages of RM250,000 made no sense.

[36] The main argument of Nanyang's counsel was that there was no evidence to prove the existence of orders that Gloveline claimed they were not able to fulfil as a result of Nanyang's breach of the agreement. As we understand Gloveline's counsel, there were documents tendered during the trial to prove the existence of the orders or contracts, but Nanyang had not included them in the appeal record and therefore Gloveline should not be prejudiced by Nanyang's neglect. Furthermore, according to Gloveline's counsel, Radwan had referred to a calculation for the sum of RM380,000, which appears at p. 241 of the appeal record, but he was not challenged on the calculation.

[37] We are not disposed to conclude that the trial judge had no evidence on which to base the award of RM250,000 or that the amount was unreasonable.

[38] We therefore dismiss this appeal with costs and order that the deposit be paid to Gloveline on account of taxed costs.